

Maurer School of Law: Indiana University Digital Repository @ Maurer Law

Articles by Maurer Faculty

Faculty Scholarship

1987

Civil Defamation Law in the Soviet Union

Fred H. Cate

Indiana University Maurer School of Law, fcate@indiana.edu

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>



Part of the [Civil Law Commons](#), and the [Comparative and Foreign Law Commons](#)

Recommended Citation

Cate, Fred H., "Civil Defamation Law in the Soviet Union" (1987). *Articles by Maurer Faculty*. Paper 864.
<http://www.repository.law.indiana.edu/facpub/864>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Civil Defamation Law in the Soviet Union

In 1961, the Supreme Soviet of the U.S.S.R. enacted the Principles of Civil Legislation, the foundation for the civil codes of the fifteen Soviet republics. Section 7 of the Principles, entitled "Defense of Honor and Dignity," provides:

A citizen or body is entitled to demand of the court the refutation of statements which reflect upon his/its honor and dignity unless the person publishing such statements proves that they are true.

If the statements referred to are published in the press and are untrue they must be retracted in the press. The procedure for refutation in other cases is to be determined by the court.

If the judgment of the court is not carried out, the court may impose on the offender a fine recoverable by the State. Payment of such fine does not relieve the offender of the liability to carry out the steps laid down in the judgment.¹

Enactment of this provision marked the first formal expression of a civil law of defamation in the Soviet Union.² In a society often charged with subrogation of personal rights to community interests, a low tolerance for dissent, and Party-defined standards of truth, the codified recognition of an individual's right to sue for defamation was nothing short of a bombshell.

¹ Principles of Civil Legislation of the Soviet Union and the Union Republics, translated in MISCELLANEA: ARTICLES AND TEXTS 263, 267 (Law in Eastern Europe No. 7, 1963) [hereinafter Principles]. It is not certain *why* Section 7 was enacted. It may have been a response to the rending effects of the Stalin era and World War II, a response to increasing economic prosperity in the U.S.S.R. and the development of increasingly complex social relations, or merely a way of reining in irresponsible journalists. See N. MALEIN, CIVIL LAW AND THE PROTECTION OF PERSONAL RIGHTS IN THE U.S.S.R. 14-18 (1985); Ioffe, *The New Codification of Civil Law and Protection of the Honor and Dignity of the Citizen*, 4 SOVIET REV. 54, 54-55 (1963).

² The Soviet Union has a criminal law of defamation as well. For a brief discussion of that criminal law, see *infra* note 53 and accompanying text. See also ENCYCLOPEDIA OF SOVIET LAW 236-38 (F. Feldbrugge, G. Van den Berg & W. Simon eds., Law in Eastern Europe No. 28, 1985) [hereinafter ENCYCLOPEDIA]. By extension, there is also so-called "social defamation" or "slander against society." A. VENGEROV & A. DANILEVICH, LAW, MORALITY AND MAN: THE SOVIET LEGAL SYSTEM IN ACTION 102 (1985).

The Soviet civil law of defamation has practical importance for people outside, as well as inside, the Soviet Union. In 1978, the Soviet Television Committee sued Craig Whitney, Moscow correspondent for the *The New York Times*, and Harold Piper, Moscow correspondent for *The Baltimore Sun*, for libel. The suit alleged that Whitney and Piper had written articles for their respective papers³ contending that the television confession of Soviet dissident Zviad Gamsakhurdia had been fabricated.⁴ More recently, California businessman Raphael Gregorian sued the Soviet Ministry of Trade for defamation under U.S. law, alleging that statements circulated by the ministry damaged his medical supplies export business. Gregorian's damage award of \$456,000 was overturned in 1987.⁵

This note examines the evolution of Soviet defamation law since 1961, the current state of that law, and the principal differences between defamation law in the Soviet Union and United States. The note concludes by considering the theoretical underpinnings of legally protected reputation rights and the inferences about modern Soviet society that may be drawn from the Soviet conception of these rights.

I. SOVIET DEFAMATION LAW

A. *The 1961 Enactment and Its Reception by the Press*

N.S. Khrushchev's report to the Twenty-Second Party Congress of October 17, 1961, foreshadowed the enactment of Section 7 of the Principles of Civil Legislation: "The rights, freedom, honor and dignity of the Soviet citizen will be closely protected by society and by the State."⁶ The Party repeated this commitment to protect the "personal dignity of each citizen" in the new Program of the Communist Party, adopted on October 31 of that year.⁷ The subsequent adoption of Section 7 of the

³ Piper, *Sources Close to Soviet Dissident Brand His TV Confession as False*, *The Sun* (Baltimore), May 25, 1978, at A4, col. 1; Whitney, *Friends of a Soviet Dissident Say His TV Confession Was Fabricated*, *N.Y. Times*, May 25, 1978, at A10, col. 1.

⁴ The judge ruled against the journalists and ordered them to prepare a retraction. They refused to do so. The Foreign Ministry agreed to allow them, in the "interest of developing Soviet-American relations," to forego the retraction after the journalists had been fined 50 rubles. Whitney and Piper did have to pay court costs of 2,289.07 rubles (approximately \$3,500). See Whitney, *On Trial in Moscow*, *HARPER'S*, Dec. 1978, at 85, 89.

⁵ See *Wash. Post*, Feb. 4, 1987, at A7, col. 5; *Wash. Post*, July 1, 1986, at A4, col. 2.

⁶ Khrushchev, *Report on the Program of the Communist Party of the Soviet Union*, 2 DOCUMENTS OF THE 22ND CONGRESS OF THE CPSU 109 (1961).

⁷ PROGRAMME OF THE COMMUNIST PARTY OF THE SOVIET UNION 109-10 (1961).

Principles on December 8, 1961, was hardly suprising.

The Soviet press greeted the enactment of Section 7 with less than enthusiasm. More than a mere check on its accuracy, the provision threatened the role of the press in the time-honored institution of "socialist criticism and self-criticism."⁸ "Dogooders, zealots, and busybodies, always ready to fire off an indignant letter to the local newspaper, exposing the alleged or imagined sins of their neighbors and co-workers, now could no longer retreat behind protestations of their good faith when summoned to court to prove the truth of their statements."⁹ Section 7 requires the person making the allegation to prove its accuracy in court, a drastic departure from a system that seldom required informers to prove their allegations, and certainly never in court.¹⁰ Section 7 was perceived as shifting power away from the Party and its press organs in favor of the judicial system.

Izvestiia, the Soviet government's central press organ, launched a crusade against Section 7 by attacking people who brought complaints, judges who refused to dismiss complaints, and the concept of a civil law of defamation in general. On March 8, 1964, *Izvestiia* published an editorial contending: "In our opinion it is an altogether strange situation when the question of the factual foundation of a newspaper's exposé is to be decided, not by the Party committee of which the newspaper happens to be the printed organ, but by a court of law!"¹¹

Anecdotal evidence helps to illuminate the depths of the Soviet press's opposition to Section 7. In one case, Dr. Khris-toforov, a Party member, had been forced to resign his post as a professor at the Saratov Institute of Veterinary Medicine. Following Khris-toforov's protest, Saratov's newspaper, *Kommunist*, published an article entitled "Soaked in Science" that described him as "an inept educator, a sterile scholarly non-entity," and "a doubt was cast on his probity as a citizen."¹² Upon Khris-toforov's reinstatement at the Institute, he sued *Kommunist* under Section 7. In addition to fighting the case in court, *Kommunist* called in *Izvestiia*, which published an article that repeated the

⁸ S. LEVITSKY, COPYRIGHT, DEFAMATION, AND PRIVACY IN SOVIET CIVIL LAW 127 (Law in Eastern Europe No. 22(I), 1979).

⁹ *Id.*

¹⁰ Ioffe, *supra* note 1, at 59.

¹¹ *V zashchitu chesti i dostoinstva* (In Defense of Honor and Dignity), *Izvestiia*, No. 58, March 8, 1964, at 6, *quoted in* S. LEVITSKY, *supra* note 8, at 128.

¹² S. LEVITSKY, *supra* note 8, at 129-30. *See generally* Maggs & Winkler, *Libel in the Soviet Press: The New Civil Remedy in Theory and Practice*, 41 TUL. L. REV. 55, 59-61 (1966).

charges against Khristoforov and concluded by "branding him as a petty thief, an embezzler, and a blackmailer."¹³

The case came to trial in May 1964 before the Saratov People's Court. On May 28, *Pravda* published an article, entitled "Under a Litigious Person's Thumb," which stated that *Kommunist's* original article was "based on incontrovertible facts and documents," and questioned the necessity of court proceedings in such a clear-cut case.¹⁴ The *Pravda* article concluded: "Is it not time to put a stop, once and for all, to intrigues of this individual who is trying to find a legal justification for his loafing and shield himself from well-founded criticism?"¹⁵

Khristoforov's case was dismissed; but it was not yet at an end. *Izvestiia* continued its criticism in an article published on May 31.¹⁶ On June 13, 1964, *Izvestiia* printed a letter from a Ministry of Agriculture official, praising the paper's vigilance and noting that Khristoforov had been removed from the Saratov Institute of Veterinary Medicine.¹⁷

The press's handling of the Khristoforov case was not an isolated incident. In 1964, Trofimova-D'iachkova, a former biology teacher in Sverdlovsk, sued the local evening paper, *Vechernii Sverdlovsk*, under Section 7, for an article entitled "The Intriguer." The people's court in Sverdlovsk upheld her complaint and ordered the paper's editors to print a retraction. On February 23, 1964, *Izvestiia* took up the case, attacking the plaintiff and the court.¹⁸ *Izvestiia* repeated the original charges against the plaintiff, even though the court had already found them to be defamatory. The article concluded by noting that the same people's court had agreed to hear another Section 7 case, brought by a person "known all over Sverdlovsk as an intriguer."¹⁹ *Izvestiia* warned that the court should not use Section 7 "for the protection of intriguers, bureaucrats and parasites who are trying to shirk their responsibilities."²⁰ On the following day, the people's

¹³ S. LEVITSKY, *supra* note 8, at 130.

¹⁴ *Na povodu u sutiashnika* (Under a Litigious Person's Thumb), *Pravda*, No. 149, May 28, 1964, at 4, *quoted in* S. LEVITSKY, *supra* note 8, at 130-31.

¹⁵ *Id.*

¹⁶ *Pustotsvetam ne mesto v nauke* (There is No Place in Science for a Sterile Flower), *Izvestiia*, No. 129, May 31, 1964, at 2, *noted in* S. LEVITSKY, *supra* note 8, at 131.

¹⁷ *Posle togo kak vystupili "Izvestiia"*, *Izvestiia*, No. 140, June 13, 1964, at 5, *quoted in* S. LEVITSKY, *supra* note 8, at 132.

¹⁸ *Kliauzniki v oborone* (The Intriguer in Defense), *Izvestiia*, No. 46, Feb. 23, 1964, at 3, *noted in* S. LEVITSKY, *supra* note 8, at 133.

¹⁹ *Id.*

²⁰ *Id.*

court dismissed the other complaint.²¹

Based on this record, it seems surprising that anyone would initiate a Section 7 suit, or that any judge would be willing to hear it. In spite of its initial troubled reception, Section 7 did gain acceptance as a regular feature of Soviet civil law, and one that could coexist peacefully with legitimate criticism by the press. In response to the press's fear that Section 7 would jeopardize its critical and investigative reporting, the Civil Chamber of the Supreme Court of the Soviet Union issued a Survey on the appropriate use of Section 7 in December 1964.²² The Survey clarified many of the issues surrounding the practical details of bringing a Section 7 suit and also warned courts to be wary of attempts by plaintiffs to use the section to refute justified criticism.

Soviet jurists, including the eminent Al'bert Vladimirovich Beliauskii, also entered the debate, frequently in defense of Section 7.²³ A rich literature was spawned concerning the role of the press and criticism in achieving Communism, modifications of Section 7 that might better meet the needs of Soviet society, and the theoretical uses of defamation law, especially against defendants other than the official press.²⁴

No changes were actually made in Section 7. By the end of 1964, all fifteen Soviet republics had included its provisions in their new civil codes.²⁵ The press's direct attacks on the Section have abated, although plaintiffs and judges are still frequently tried in the pages of *Izvestiia* or Party publications. In 1977, protection of honor and dignity was elevated to the level of a constitutional right in the new Soviet Constitution: "Citizens of the USSR shall have the right to judicial protection against infringements on life and health, property and personal freedom, and honor and dignity."²⁶

²¹ NAUCHNYI KOMMENTARIJ SUDEBNOI PRAKTIKI PO GRAZHDANSKIM DELAM ZA 1964-1965 (Scholarly Commentary on Judicial Practice in Civil Cases 1964-1965), at 68-69 (1966), noted in S. LEVITSKY, *supra* note 8, at 133.

²² *Iski grazhdan i organizatsii ob oproverzhenii svedenii, porochashchikh ikh chest' i dostoinstvo* (Suits by Citizens and Organizations to Refute Statements that Defame Their Honor and Dignity)[hereinafter *Citizen Suits*], SOTSIALISTICHESKAIA ZAKONNOST' [SOTS. ZAK.], No. 12, at 17 (1964), noted in S. LEVITSKY, *supra* note 8, at 5.

²³ See Beliauskii, *Eto podnimaet v liudiakh chuvstvo sobstvennogo dostoinstva* (This Raises in People a Sense of Their Own Dignity), SOTS. ZAK., No. 8, at 22-26 (1965), noted in S. LEVITSKY, *supra* note 8, at 43.

²⁴ See generally S. LEVITSKY, *supra* note 8, at 137-42.

²⁵ See *id.* at 145.

²⁶ KONSTITUTSIYA SSSR art. 57, reprinted in 1 W. BUTLER, COLLECTED LEGISLATION

Statistics regarding Section 7 cases are sketchy, outdated, and often contradictory. According to 1971 data, about 400 cases per year were brought in defense of "honor and dignity," almost half of which were decided in the plaintiff's favor.²⁷ According to the Soviet Supreme Court's 1964 Survey, seventy-five percent of all Section 7 cases were brought by individuals against the media; the remaining twenty-five percent were brought against other individuals.²⁸ Courts upheld forty-two percent of the complaints; dismissed forty-five percent, and discontinued thirteen percent (usually upon withdrawal of the complaints).²⁹ Statistics available in 1966 indicated that the majority of cases involved criticism of individuals for failing to fulfill their labor-related obligations.³⁰

B. *Soviet Civil Defamation Law Today*

Section 7 allows individuals or organizations to sue other individuals or organizations for injuries to personal honor or dignity.³¹ The action requires: (1) publication to third parties of a statement, (2) which is defamatory and (3) false. No action will lie if any of the three elements are missing. If all three elements are proved, the court may only order retraction of the offending statement, or a monetary fine of 300 rubles or less to be paid to the State if retraction is either inadequate or not timely, or both. The fine may not be paid in lieu of retraction.

1. *Publication*

"Publication" requires the defendant to communicate a defamatory statement to someone other than the plaintiff. The form of communication is not relevant to the determination of liability, although it is important in shaping the retraction. Soviet defamation law recognizes no de jure privileges. Commentators have, however, identified three de facto privileges: (1) official communications of the Communist Party (but not statements in the Party-sponsored press); (2) statements in official documents, where the law already provides a method for contesting the con-

OF THE UNION OF SOVIET SOCIALIST REPUBLICS AND THE CONSTITUENT UNION REPUBLICS 18 (1980).

²⁷ ENCYCLOPEDIA, *supra* note 2, at 235; see also G. VAN DEN BERG, THE SOVIET SYSTEM OF JUSTICE: FIGURES AND POLICY 159 (Law in Eastern Europe No. 29, 1985).

²⁸ *Citizen Suits*, *supra* note 22.

²⁹ *Id.*

³⁰ Maggs & Winkler, *supra* note 12, at 59.

³¹ Principles, *supra* note 1, at 267.

tents of those documents; and (3) statements made in exercise of the defendant's public duty.³²

2. Defamation

Statements are "defamatory" only if they impute to the plaintiff conduct or characteristics which are inconsistent with Socialist morality or law.³³ The motivation of the speaker or publisher is irrelevant in Soviet civil defamation law.³⁴ The statements must injure the plaintiff's reputation, not merely his feelings. Insults are not actionable. Al'bert Vladimirovich Beliauskii noted that Soviet courts have found defamatory statements that charge:

1. non-fulfillment of work, of professional duty;
2. dishonesty or illegal receipt of money;
3. breach of rules of life of socialist society;
4. breach of filial duty;
5. immorality in daily life, and insulting a woman's honor;
6. a criminal act;
7. perjury or slander.³⁵

3. Falsity

This is perhaps the simplest element of a *prima facie* defamation case under Soviet civil law. For a defamation action to lie, the offending statement must be materially false.³⁶

II. U.S. DEFAMATION LAW

Before contrasting Soviet and U.S. defamation law, a brief examination of the fundamentals of the U.S. law of defamation is appropriate.

A. U.S. Common Law

Prior to the constitutionalization of libel law, courts evolved an elaborate common law of defamation which continues to control most state libel actions in the United States. Under common law, the defendant was strictly liable for any defamation that re-

³² S. LEVITSKY, *supra* note 8, at 27-28.

³³ BULLETEN' VERKHOVNOVO SUDA SSSR, No. 1, at 12 (1972), *quoted in* S. LEVITSKY, *supra* note 8, at 38; Ioffe, *supra* note 1, at 58; Maggs & Winkler, *supra* note 12, at 58.

³⁴ Ioffe, *supra* note 1, at 58-59.

³⁵ Beliauskii, *O grazhdansko-pravovoi zashchite chesti* (On the Civil Legal Defense of Honor), SOVETSKOE GOSUDARSTVO I PRAVO, No. 9, at 116, 119 (1965), *quoted in* Maggs & Winkler, *supra* note 12, at 58-59.

³⁶ See Principles, *supra* note 1, at 267; *see also* Ioffe, *supra* note 1, at 58.

sulted from the publication of a slander or libel.³⁷ The plaintiff had to prove only the fact of publication and, in some cases, damage to his or her reputation. The burden then shifted to the publisher-defendant to prove one or more of four available defenses: truth, consent, absolute privilege, or conditional privilege.

Truth and consent are absolute bars to recovery for defamation.³⁸ Absolute privileges apply to communications that are important for public policy reasons. Absolute privileges at common law are accorded to statements made in court, official communications between high-level public officials, and statements made during legislative proceedings. These communications are allowed regardless of their effect or their publisher's intentions.³⁹

Conditional privileges, by contrast, protect interests that are important to public policy, but not so vital that they can never be abused or overcome by an individual's reputational interests. Most conditional privileges apply to individuals, and protect communications involving the individual and joint interests of the publisher and receiver of information.⁴⁰

To overcome a conditional privilege, the plaintiff must show that the publisher was motivated by common law actual malice—hatred, ill will, or spite—rather than by a desire to serve the interest that the privilege was designed to protect.⁴¹ The media traditionally enjoyed the conditional privileges of "fair comment," which protects statements of opinion about public figures,⁴² and "fair report," which protects fair and accurate reports of government proceedings.⁴³

B. *U.S. Constitutional Law*

In 1964, the U.S. Supreme Court applied the First Amendment of the U.S. Constitution⁴⁴ to a defamation action. In *New*

³⁷ For a discussion of the difference between libel and slander, see W. PROSSER & W. KEETON, *PROSSER & KEETON ON THE LAW OF TORTS* 786–87 (5th ed. 1984).

³⁸ For a discussion of these defenses, see 2 F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* §§ 5.17, 5.20 (2d ed. 1986).

³⁹ See generally R. SACK, *LIBEL, SLANDER, AND RELATED PROBLEMS* § VI.2 (1980).

⁴⁰ See *id.* § VI.3.

⁴¹ *Id.*

⁴² Public officials, playwrights, and authors are examples of public figures. See *id.* § IV.3.4.

⁴³ See *id.* §§ IV.3, VI.3.7.

⁴⁴ The First Amendment to the U.S. Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

York Times Co. v. Sullivan,⁴⁵ the Court ruled that a public official cannot recover damages for libel unless the official proves that the alleged libel was published with knowledge of its falsity, or with reckless disregard of its truth or falsity. The Court called this standard actual malice. In *Time, Inc. v. Hill*,⁴⁶ the Court applied the *New York Times* actual malice standard to privacy actions brought by private citizens defamed by "false reports of matters of public interest."⁴⁷ In 1971, the trend toward greater constitutional protection for media defendants peaked with *Rosenbloom v. Metromedia, Inc.*,⁴⁸ in which a plurality of the justices applied the *New York Times* standard to a defamation action brought by private individuals involved in matters of public interest.

Three years later, the Court overruled *Rosenbloom* in *Gertz v. Robert Welch, Inc.*⁴⁹ The Court held that if the plaintiff is a private individual, the constitutional protection enjoyed by the media may be less than the *New York Times* actual malice standard. States are free to establish their own standards of liability, provided that liability is not imposed without regard to fault and that punitive damages are not awarded without proof of *New York Times* actual malice.⁵⁰

In 1985, the Court reinterpreted *Gertz* in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*⁵¹ The Court held that the *Gertz* requirement of *New York Times* actual malice for punitive damage awards applied only if the defamation concerned a subject of public interest.⁵² The Court did not define "public interest."

III. A COMPARISON OF SOVIET AND U.S. DEFAMATION LAW

Soviet and U.S. defamation law differs in a number of important aspects. First, the U.S. has no law of criminal defamation, while the Soviet Union recognizes criminal defamation as an offense.⁵³ Second, the Soviet Union regards the defendant's moti-

⁴⁵ 376 U.S. 254 (1964).

⁴⁶ 385 U.S. 374 (1967).

⁴⁷ *Id.* at 388.

⁴⁸ 403 U.S. 29 (1971).

⁴⁹ 418 U.S. 323 (1974).

⁵⁰ *Id.* at 347-48.

⁵¹ 105 S. Ct. 2939 (1985).

⁵² *Id.* at 2944-46.

⁵³ The *prima facie* case for criminal defamation is "the circulation of fabrications known to be false which defame another person." UGOLIVNI KODEKS RSFSR art. 130, in 1 SOV. STAT. & DEC. 3, 60-61 (1964). One notable difference between civil and criminal defamation law is the relevance of the defendant's motivation: criminal defamation law requires showing that the defendant knew the statements were false, but published them

vation in making defamatory statements as irrelevant,⁵⁴ while in U.S. defamation cases the defendant's motivation is often central. U.S. courts require a showing of the defendant's actual malice if the plaintiff is a public official,⁵⁵ and of negligence if the plaintiff is a private party and the subject of the communication is of public interest.⁵⁶ Third, the primary remedy available under Soviet law is retraction. U.S. courts never compel retraction because of the First Amendment, although extremely heavy compensatory or punitive damages may be assessed.⁵⁷

Fourth, the absence of privileges in Soviet law⁵⁸ contrasts notably with the mass of privileges that U.S. common law has bequeathed for various forms of communications. The existence of these privileges may pose an absolute barrier to recovery, as in the case of fair and accurate reports of judicial proceedings, or a mere presumption of the defendant's innocence, which the plaintiff may overcome by showing negligence, recklessness, or actual malice, depending on the particular privilege involved.

A fifth difference between Soviet and U.S. defamation law concerns the burden of proof. In the Soviet Union, the defendant is obligated to prove the truth of allegedly defamatory statements.⁵⁹ In the U.S., the plaintiff is usually required to prove the falsity of such statements.⁶⁰

nonetheless; Soviet civil defamation law has no such requirement. The penalties for criminal defamation range from social censure to as much as five year's imprisonment. *ENCYCLOPEDIA*, *supra* note 2, at 237. Criminal defamation actions in the Soviet Union appear to be rare.

⁵⁴ See *supra* note 34 and accompanying text.

⁵⁵ See *supra* note 41 and accompanying text.

⁵⁶ See *supra* notes 45-48 and accompanying text.

⁵⁷ See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 254-58 (1973) and sources cited therein.

⁵⁸ As noted in the previous discussion, there are three de facto privileges in Soviet law. See *supra* text accompanying note 32. Interestingly, the latter two of these three categories of speech would be privileged under common law in the United States as well. Defamatory statements in government documents are often protected by common-law absolute privilege. See *supra* note 39 and accompanying text. Defamatory statements made in the exercise of the defendant's public duty are often protected by conditional privilege. See *supra* note 40 and accompanying text.

⁵⁹ Ioffe, *supra* note 1, at 59.

⁶⁰ See *New York Times v. Sullivan*, 376 U.S. 254 (1964) (public official plaintiffs have burden of proving falsity); *Philadelphia Newspapers, Inc. v. Hepps*, 106 S. Ct. 1558 (1986) (a private plaintiff has the burden of proving falsity whenever the defamation is a matter of public interest).

IV. SOVIET DEFAMATION LAW AND SOVIET SOCIETY

A. *Concepts of Reputation*

Robert Post recently examined the concepts of "reputation" that defamation law might protect.⁶¹ Post identifies three historical concepts of reputation—reputation as property, reputation as honor, and reputation as dignity—and discusses the sociological implications of providing legal protection to each category of reputational interest.

Post's conception of "reputation as property" suggests a marketplace economy in which every player may earn a reputation.⁶² An individual's reputation can be developed and demolished, sometimes repeatedly, within her lifetime. The value of that reputation at any given time can be measured in monetary terms, just as business goodwill can be entered on a corporate balance sheet.

According to Post, "reputation as honor" is "a form of reputation in which an individual personally identifies with the normative characteristics of a particular social role and in return personally receives from others the regard and estimation that society accords to that role."⁶³ An individual does not create reputation as honor. An individual claims it by adhering to the role in society that he or she occupies. This suggests that in a society that protects reputation as honor, people occupy roles with varying reputations. Moreover, reputation as honor is not merely an individual attribute, as reputation as property might be. Instead, reputation as honor tends to define the person as a whole by defining the person's position in society. Post writes:

The preservation of honor . . . entails more than the protection of merely individual interests. Since honor is not created by individual labor, but instead by shared social perceptions that transcend the behavior of particular persons, honor "is a public good, not merely a private possession."⁶⁴

. . . .

The protection of honor thus involves the maintenance of "the consensus of the society with regard to the order

⁶¹ Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

⁶² *Id.* at 693.

⁶³ *Id.* at 699-700.

⁶⁴ *Id.* at 702 (quoting Bellah, *The Meaning of Reputation in American Society*, 74 CALIF. L. REV. 743, 745 (1986)).

of precedence." To serve this function, defamation law must define and enforce the ascribed status of social roles.⁶⁵

Remedies for defaming reputation as honor must assuage honor, not compensate financial loss.

Finally, according to Post, reputation as dignity involves "a ritual and ceremonial aspect of the self that we associate with the self's integrity, which is to say with its completeness. . . . In this way our own sense of intrinsic self-worth . . . is perpetually dependent upon the ceremonial observance by those around us of rules of deference and demeanor."⁶⁶ The law protecting reputation as dignity essentially codifies the rules of deference and demeanor, or as Post labels them, the "rules of civility."⁶⁷ Protecting reputation as dignity involves protecting the individual's interest in appearing to conform to society's rules of civility, and society's interest in upholding the rules.⁶⁸

Conforming to society's rules of civility signals that one belongs; having one's conformity questioned suggests that one does not belong. Remedying an injury to reputation as dignity does not require money. Rather, some form of rehabilitation is necessary, such as a court's declaration that the plaintiff did conform with the community's rules of civility. Rehabilitation confirms the plaintiff's membership in society and reaffirms the society's identity.

Post's analysis of reputation is limited to identifying features of common law defamation. Other legal systems respond differently to these concepts.

Nikolai Malein, Professor at the Institute of State and Law of the U.S.S.R. Academy of Sciences and one of the drafters of Section 7, has described the Soviet conception of honor and dignity in terms that comport closely with Post's analytical framework.

Honor is society's opinion of an individual, the measure of

⁶⁵ *Id.* at 702 (quoting Pitts-Rivers, *Honour and Social Status*, in HONOUR AND SHAME: THE VALUES OF THE MEDITERRANEAN 21-22, 38 (J. Peristiany ed. 1966)).

⁶⁶ *Id.* at 710 (citation omitted).

⁶⁷ *Id.*

⁶⁸ Society has an "interest in defining and maintaining the contours of its own social constitution." *Id.* at 711. Post uses the terms "deference" and "demeanor" to describe the rules according to which daily social interaction occurs. "Rules of deference define conduct by which a person conveys appreciation 'to a recipient of this recipient, or of something of which this recipient is taken as a symbol, extension, or agent.' Rules of demeanor define conduct by which a person expresses 'to those in his immediate presence that he is a person of certain desirable or undesirable qualities.'" *Id.*, at 709 (quoting E. Goffman, *INTERACTION RITUAL* 56, 77 (1967)).

a citizen's social and spiritual qualities as a member of society. . . .

Using the socialist community's standard of good and evil, fairness, and humanism, society judges each individual by his behavior, forming opinions of his morals and ethics as he interacts with other members of the society or the collective in which the given individual works.⁶⁹

Dignity, according to Malein, reflects the internal self-assessment of an individual's abilities and morality. Honor, society's view of the person in his or her societal role, may differ from dignity, a person's moral and ethical self-appraisal. Both qualities are important to society as a whole: honor, because it reflects on societal roles; dignity, because it defines the type of individual activities and ethics that society will allow. "Honor and dignity characterize the individual and reflect social relations between the individual and the society. Therefore, honor and dignity bear much social significance and are protected by law against all violations."⁷⁰

B. *Protecting Reputation: The Competing Interests*

The Soviet civil law of defamation protects reputation as honor and dignity.⁷¹ Under Soviet law, the plaintiff must prove only the publication of statements by the defendant. The court determines the defamatory nature of those statements in light of socialist morality and law. The legal inquiry addresses not whether the individual plaintiff has been damaged in some specific or measurable way, but rather whether she has been accused of not conforming to society's rules of civility (dignity) or living up to the standards required her position in society (honor). Soviet defamation law focuses on ideal standards of behavior for all Soviet citizens and for the people occupying particular positions in Soviet society, and seeks to discover whether the defendant has accused the plaintiff of not meeting those standards.

If the court, representing the people, finds the defendant's statements defamatory, it orders the defamer to publish a declaration to that effect in the same manner in which the offending statements were published. O.S. Ioffe has written:

Inasmuch as the right to honor and dignity is the right to a

⁶⁹ N. MALEIN, *supra* note 1 (emphasis added).

⁷⁰ *Id.* at 41-42.

⁷¹ Section 7 is entitled "Defense of Honor and Dignity."

deserved judgment by society, it is only this judgment that can be of significance to proper decision in cases of this type. . . . [T]his is made by the court acting as surrogate for Soviet society as a whole.⁷²

The fact that the *defendant* has the burden of showing that the statements were true, also comports with the perceived effect of defamation on the society as a whole. The burden of proof is shifted in favor of the defamed party.

The title of Section 7, "Defense of Honor and Dignity," correctly suggests that Soviet defamation law does not seek to protect reputation as property, as Robert Post conceives it. The Soviet civil law of defamation does not allow damages,⁷³ which are a logical remedy for property loss, but instead, prescribes retraction. Furthermore, Soviet courts have repeatedly refused to allow recovery for defamation if statements only concern the individual's marketable skills.

In many instances where Anglo-American law would regard a word or a statement as actionable *per se* in libel because it tends to reflect on the professional or trading reputation of the plaintiff, Soviet law may bar the injured party altogether from seeking relief under Section 7, if no behavior is imputed to the plaintiff which is deserving of a negative "moral-political" evaluation by society.⁷⁴

Even though a statement might lower a plaintiff's reputation in the eyes of business or professional associates, thereby lessening its property value, Section 7 permits no recovery unless the statement is also defamatory according to standards of Socialist morality. The people's court in Minsk, for example, dismissed a suit against the magazine *Energetika*, which had published an article describing the plaintiff's scholarly work as incoherent.⁷⁵ The article may have damaged the plaintiff's reputation, but it did not

⁷² Ioffe, *supra* note 1, at 58.

⁷³ There are ideological explanations for the Soviet legal system's general lack of reliance on monetary remedies—the cure-all of the capitalist world—in contract, criminal, and defamation law. There has been considerable debate among legal scholars in the Soviet Union over whether monetary damages might be appropriate in defamation actions where the libel or slander has resulted in demonstrable, measurable economic loss to the plaintiff. Most Soviet jurists would compensate a pecuniary injury "if it constituted an independent cause of action . . . for infliction of delictual or quasi-delictual harm." S. LEVITSKY, *supra* note 8, at 16–17. However, Western common-law notions of general, presumed, exemplary, or punitive damages do not apply under Soviet civil law. *Id.*

⁷⁴ *Id.* at 31.

⁷⁵ N. MALEIN, *supra* note 1, at 43.

accuse him of violating any tenets of Socialist morality or law.⁷⁶

The use of defamation laws to serve societal interests is not limited to Socialist states. In the United States, reputation is often treated as a property right, yet the government tailors the conditions under which reputation can be vindicated to serve state interests that it perceives to be more valuable than individual interests. Many common law absolute and conditional privileges demonstrate the state's manipulation of defamation law. Communications in court or in the legislature, for instance, are absolutely privileged. A private individual, no matter how savagely or deliberately defamed in official proceedings, has no recourse for protecting her reputation.⁷⁷

The U.S. Supreme Court has also substantially limited the individual's right to seek redress for reputational harm. By requiring public plaintiffs to prove *New York Times* actual malice,⁷⁸ and private plaintiffs to show negligence⁷⁹, the Court has severely restricted the individual's legal capacity to restore an injured reputation. The Court has commented on the effect of its libel rulings:

[The *New York Times* actual malice] standard administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test.⁸⁰

Society's interest in encouraging certain categories of speech, including speech about public officials,⁸¹ overrides the individual's interest in protecting reputation.

V. CONCLUSION

In 1961, the Soviet Government took the unprecedented step of formally enacting a civil law of defamation. Twenty-five years

⁷⁶ See S. LEVITSKY, *supra* note 8, at 31 ("according to most Soviet jurists, it is not defamatory under Soviet law to allege that the plaintiff lacks the skill, knowledge, or some other characteristic essential to the successful carrying on of his profession or trade").

⁷⁷ See 2 F. HARPER, F. JAMES & O. GRAY, *supra* note 38, § 5.22.

⁷⁸ See *supra* notes 44-45 and accompanying text.

⁷⁹ See *supra* notes 46-50 and accompanying text.

⁸⁰ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1964).

⁸¹ *Id.* at 344-45.

later, "protection of honor and dignity" has become an established right in the U.S.S.R. that Soviet jurists and courts regularly defend and uphold.

The Soviet civil law of defamation should not be taken out of its societal context. Soviet society still stresses criticism and the importance of ferreting out and prosecuting malingerers.⁸² Moreover, Soviet defamation law has fundamentally different definitions, procedures, and objectives than its U.S. counterpart. Soviet law seeks to protect a concept of reputation that is defined by individual adherence to society's norms. The Soviet emphasis on the detection and cure of defamation is not based on individual interest, but rather on a paramount community interest.

Soviet defamation law is not wholly distinct from U.S. defamation law, however. Although U.S. law protects a different concept of reputation (reputation as property) in order to defend *individual* interests rather than societal norms, societal interests are still important in the U.S. system. When societal interests have special importance, U.S. courts and state legislatures have had little difficulty in finding those societal interests paramount over the interests of injured individuals.

*Fred H. Cate**

⁸² According to article 49 of the Soviet Constitution, Soviet citizens are guaranteed the right to criticize officials without threat of prosecutions. See generally A. VENCEROV & A. DANILEVICH, *supra* note 2, at 90-111.

* The author is grateful to Dr. Frances Foster-Simons, Stanford Law School, for her insight and encouragement. She is not responsible for the conclusions or any errors contained in this Note.